

§ 35.18

- (a) Be accompanied, represented, and advised by a representative;
- (b) Participate in any conference held by the ALJ;
- (c) Conduct discovery;
- (d) Agree to stipulations of fact or law, which shall be made part of the record;
- (e) Present evidence relevant to the issues at the hearing;
- (f) Present and cross-examine witnesses;
- (g) Present oral arguments at the hearing as permitted by the ALJ; and
- (h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

§ 35.18 Authority of the ALJ.

- (a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.
- (b) The ALJ has the authority to—
 - (1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;
 - (2) Continue or recess the hearing in whole or in part for a reasonable period of time;
 - (3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;
 - (4) Administer oaths and affirmations;
 - (5) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;
 - (6) Rule on motions and other procedural matters;
 - (7) Regulate the scope and timing of discovery;
 - (8) Regulate the course of the hearing and the conduct of representatives and parties;
 - (9) Examine witnesses;
 - (10) Receive, rule on, exclude, or limit evidence;
 - (11) Take official notice of facts;
 - (12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;
 - (13) Conduct any conference, argument, or hearing on motions in person or by telephone; and

43 CFR Subtitle A (10–1–03 Edition)

- (14) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to find Federal statutes or regulations invalid.

§ 35.19 Pre-hearing conferences.

- (a) The ALJ may schedule pre-hearing conferences as appropriate.
- (b) Upon the motion of any party, the ALJ shall schedule at least one pre-hearing conference at a reasonable time in advance of the hearing.
- (c) The ALJ may use pre-hearing conferences to discuss the following:
 - (1) Simplification of the issues;
 - (2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;
 - (3) Stipulations and admissions of fact or as to the contents and authenticity of documents;
 - (4) Whether the parties can agree to submission of the case on a stipulated record;
 - (5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;
 - (6) Limitation of the number of witnesses;
 - (7) Scheduling dates for the exchange of witness lists and of proposed exhibits;
 - (8) Discovery;
 - (9) The time and place for the hearing; and
 - (10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.
- (d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a pre-hearing conference.

§ 35.20 Disclosure of documents.

- (a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 35.4(b) of this part are based, unless such documents are subject to a privilege under

Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 35.5 of this part is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to § 35.9 of this part.

§ 35.21 Discovery.

(a) The following types of discovery are authorized:

- (1) Requests for production of documents for inspection and copying;
- (2) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact;
- (3) Written interrogatories; and
- (4) Depositions.

(b) For the purposes of this section and §§ 35.22 and 35.23 of this part, the term “documents” includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) *Motions for discovery.* (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion

and/or a motion for protective order as provided in § 35.24 of this part.

(3) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought—

- (i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;
- (ii) Is not unduly costly or burdensome;
- (iii) Will not unduly delay the proceeding; and
- (iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 35.24 of this part.

(e) *Depositions.* (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 35.8 of this part.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

§ 35.22 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 35.33(b) of this part. At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, shall provide